Supreme Court, U. S.
FILED
NOV 11 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,
Petitioner

versus

CLAY L. SHAW
(EDWARD F. WEGMANN, EXECUTOR),
Respondent

RESPONSE TO PETITION FOR CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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As directed by the Court, respondent, Edward F. Wegmann, files this response to the petition of Willard E. Robertson praying that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in No. 75-2091, rendered on January 24, 1977 (rehearing denied, June 20, 1977), affirming the judgment of the District Court denying defendants' motion to dismiss this action for damages under 42 USC 1983 for the reason that it had abated with plaintiff's death.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F 2d 980, and is reproduced as Appendix A, p. 14; the order of the Fifth Circuit denying the application for rehearing is reproduced as Appendix C, p. 30. The decision of the United States District Court for the Eastern District of

Louisiana is reported at 391 F. Supp. 1353, and appears as Appendix D, p. 32.

JURISDICTION

Petitioner has filed his application for certiorari pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

Respondent does not agree with petitioner's presentation of the questions presented and submits that the questions presented are:

1. There being no Federal Statutory Law of survival of Civil Rights actions, does this lack of survival make the Federal law "deficient in the provisions necessary to furnish suitable remedies" for Civil Rights violations?

2. Whether this pending action for damages sustained by plaintiff, Clay Shaw, prior to his death, survives in favor of the substituted plaintiff, the personal representative of his succession, Edward F. Wegmann, the duly qualified Testamentary Executor of the Succession of Clay Shaw, the original plaintiff, as a matter of Federal common law.

STATUTES INVOLVED

The statutes involved are as stated at page 3 of petitioner's application.

STATEMENT OF THE CASE

The Trial Court correctly and accurately stated the case,

the course of the proceeding conducted in the lower court, and the facts relevant to the issues presented for review (Appendix D, p. 32). For additional facts pertaining to the case, see *Shaw v. Garrison*, 328 F. Supp. 390 (E.D. Ala. 1971, Affirmed 467 F.2d 113, 5th Cir. 1972), most especially the Trial Court's findings of fact and conclusions of law as set forth in said opinion.

It is interesting to note that Garrison and the other defendants, including the petitioner, have taken great umbrage at the fact that the Trial Court saw fit in writing its opinion to outline in some detail the present posture of this litigation, which, as it was termed by the Trial Court, and by many other writers, "one of the most bizarre episodes in American political and legal history". The background of this litigation is essential to a complete understanding of the case, and any statement of the case which does not include a detailed account of the background of the litigation, would be incomplete if, as was held by the Trial Court, ". . .Shaw surely deserves an opportunity to have his day in Court and attempt to clear his name, if only post-humously". The Court must have full knowledge of the background of the litigation.

Petitioner and his co-defendants have been highly critical of the Trial Court's opinion resulting in the issuance of an order denying their motion to dismiss. A reading of the Trial Court's opinion will reflect that it is a well-reasoned opinion which accurately states the facts of the case and after a detailed and analytical review of the statutes and jurisprudence, rightfully concludes that there is no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative

of the deceased.

The Appellate Court agreed with the Trial Court and borrowed liberally from Judge Heebe's reasoning in his opinion.

The Appellate Court termed the facts of the case Kafkaesque, and very briefly stated the late Clay Shaw, through his Executor, respondent herein, charges that former District Attorney, Garrison, and other defendants, including petitioner, Robertson, and other citizens of New Orleans, deprived Shaw of his Civil Rights by improperly and illegally linking him with the Kennedy assassination and by conducting, as well as financing, a well publicized investigation and prosecution of him for his alleged role in the Kennedy assassination. The question presented to the court arises because Shaw died after the damage suit was initiated on his behalf, but before the matter was brought to trial.

REASONS FOR DENYING THE WRIT

The Trial Court, as well as the Appellate Court, was correct when it refused to follow the law of the forum state, since to do so, would have resulted in the dismissal of Shaw's Section 1983 claim.

The Trial Court, as well as the Appellate Court relied upon the clause in Section 1988 providing for those situations where there is no federal survival statute which would afford the substituted plaintiff, respondent herein, a suitable remedy. The Trial Court, as well as the Appellate Court, emphasized this clause, saying:

> ". . .so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the said Courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty".

The Trial Court cited numerous authorities to the effect that the failure of Congress to provide for survial in the Federal Rights Laws is a deficiency in those provisions. The Trial Court's opinion stated that there was a "gap" and a deficiency in the Federal law. That such is the case is amply supported by the Appellate Court's decision in *Brazier v. Cherry*, 293 F.2d, 401, CCA 5, 1961. The Trial Court stated:

> "Every court that has considered the matter has found either explicitly or by implication that the lack of survival provisions in the Federal Civil Rights Law is such a deficiency."

Having concluded that there was a deficiency and a gap in the Federal Survival Statute, the lower courts gave consideration as to whether or not the Louisiana law furnishes a suitable remedy to the plaintiff and the substituted plaintiff, and concluded after analyzing the applicable provisions of the Louisiana Code of Civil Procedure, as well as those of the Louisiana Civil Code, that under those laws, pending actions, such as this one, do not survive in favor of the deceased plaintiff's personal representative. The Trial Court likewise concluded that under Section 1988, the Federal Court must not apply State law if it is "inconsistent with the Constitution and laws of the United States."

It is well established that the policy of the Civil Rights Laws favors survival of the action. The Louisiana statutes limit the classes of persons in favor of whom an action survives; hence, as was stated by the Trial Court "this policy of limiting the classes of persons in favor of whom an action survives (is) equally inconsistent with the Federal Civil Rights Laws."

In *Brazier*, the Fifth Circuit stressed the fact that the policy of the Civil Rights Acts is to afford relief, stating:

> ". . .from a Federal standpoint, the only limitation upon the use of such adoptive State legislation, rule or decision is that it is suitable to carry the law into effect because other available direct Federal legislation is not adapted to that object, or is deficient in furnishing a fully effective regress. . . ."

Nowhere in Section 1988 is it stated that the Federal Courts are bound by an inhospitable State law. Quite to the contrary, Section 1988 makes it implicit that the law of the State in which the Federal Court has jurisdiction must not be inconsistent with the Constitution and laws of the United States. Nor does the Section express restrictiveness or exclusiveness. As was stated by the Trial Court:

> "Here we have found Section 1988 to be inapplicable because a State law is not suitable to carry the (Federal) law into effect."

Following this provision of Section 1988 to its rightful conclusion, the State law is inconsistent with the laws of

the United States because the Louisiana law does not provide for the survival necessitated by the policies which generated the Civil Rights Statutes. Hence, the Louisiana Statutes and Codal provisions need not, and should not, be applied.

The need to provide for survival of Federal Civil Rights actions is particularly acute in cases such as this one where the deceased plaintiff's Federal Constitutional rights were misused and abused by the prosecuting attorney, Garrison, and his co-conspirators, including petitioner herein, in bad faith, with no hope of successful prosecution of the criminal charges which the prosecuting attorney caused to be filed against Shaw. The extent to which the prosecuting attorney, acting in concert with his co-conspirators, including petitioner herein, abused and misused the powers of his office of District Attorney in direct violation of the Federally guaranteed rights of Shaw is shown with clarity in the Conclusions of Fact of Judge Christenberry in the case of *Shaw v. Garrison*, supra.

The Appellate Court as well as the Trial Court were eminently correct in their holding that a Federal Court should not apply State law if it is "inconsistent with the Constitution and laws of the United States", and held that Louisiana law "is inconsistent with Federal law and should not be applied".

I. THE LOUISIANA SURVIVAL STATUTE.

Respondent does not deny that if Article 2315 of the Louisiana Civil Code is applicable, the motion to dismiss should be granted. It is submitted, however, that the Trial

Court's holding, as well as that of the Appellate Court, is in conformity with the provisions of Section 1988.

II. THE LAW OF LOUISIANA IS INCONSISTENT WITH THE LAWS OF THE UNITED STATES

The Louisiana Survival Statute is inconsistent with the Constitution and laws of the United States and were it to be applied, Shaw's cause of action would abate, hence there can be no doubt but that it is inconsistent with the Federal law and should not be applied.

The fact that other Federal laws not pertinent to the issues of this case, or pertinent to any Civil Rights action, may provide for survival of actions is of no importance. The fact remains that Section 1988 does not contain any provision with respect to survival of the action, as a result of which, there is a "gap" in the statute, and as a further result of which, it is deficient. Therefore, following the policies established and generated by the Civil Rights Acts, this action should survive in favor of the personal representative of the deceased plaintiff.

To apply Article 2315 of the Louisiana Civil Code to this case would be unjust, inequitable, and a violation of the deceased plaintiff's Fourteenth Amendment right, since States' survival statutes vary from State to State, as the result of which there is a complete lack of uniformity.

"The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality and civil rights before the law in all respects for all persons em-

braced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States; that the protection to the individual to be afforded by them was not intended by Congress to differ from State to State, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the State in which the Federal Court suit was brought. Federal common law must be applied to affect uniformity; otherwise, the Civil Rights Act would fail to effect the purpose and ends which Congress intended." *Batista v. Weir*, 240 F.2d 74, 1965; *Gilmore v. City of Montgomery*, 94 S.Ct. 2416, 1974.

The rights of survivorship as established by Article 2315 of the Louisiana Civil Code are inhospitable to the present matter. They produce an invidious discrimination by narrow protection and thus violate the equal protection clause of the Fourteenth Amendment. See *State v. Devall*, 302 So. 2d 909, 1974; *Primeaux v. Libersat*, 307 So. 2d 740, 1975; *Dunn v. Blumstein*, 405 US 330, 92 S. Ct. 995, 31 L.Ed 2d 274, 1972; *Reed v. Reed*, 404 US 71, 92 S. Ct.. 251, 30 L.Ed. 2d 225, 1972; *Weber v. Aetna Casualty and Surety Co.*, 406 US 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768, 1972; *Dandridge v. Williams*, 397 US 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491; *Jimenez v. Weinberger*, 94 S.Ct. 2496, 1974; *Village of Belle Terre v. Borass*, 94 S.Ct. 1536, 1974; *Gulf Utilities Co. v. Traigle*, 319 So.2d 78, 1975; *Stanton v. Stanton*, 95 S.Ct. 1373, 1975.

"The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 US 229, 90 S.Ct. 400, 24 L.Ed. 2d 386, 1969. Congress did not create enforceable Civil Rights

such as those provided for under the statutes applicable to this case, so as to allow the State to destroy those rights, or preclude them, as would be the case here, if Louisiana law is applied. If Article 2315 of the Louisiana Civil Code is applied, it would have the effect of destroying the Civil Rights provided for by Congressional mandate.

III. THE TRIAL COURT AS WELL AS THE APPELLATE COURT PROPERLY APPLIED FEDERAL COMMON LAW

Faced with the dilemma of an inhospitable State law and a deficient Federal law, the Trial Court solved the dilemma by holding that the old common law of abatement was no longer controlling. It likewise found that the trend of this Court was in favor of survival of Civil Rights actions. See *Van Breck v. Sabine Towing Co.*, 300 US 342, 57 S.Ct. 452, 81 L. Ed. 685, 1937; *Just, et al v. Chambers, Executrix*, 312 US 383, 61 S.Ct. 687, 85 L. Ed. 903, 1941; *Cox, et al. Administrators, et al v. Roth, Administrator*, 348 US 207, 75 S.Ct. 242, 99 L. Ed. 260, 1955.

As was said by the Trial Court:

> "We thus find no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased. To the contrary, such a holding seems required by the policies underlying the Civil Rights laws and the Supreme Court's treatment of survival of actions in analageous contexts."

As was said by the Fifth Circuit in *Brazier v. Cherry*,

supra, at 406:

> "At every turn the Supreme Court by drawing on available State legislation or giving broad liberal effect to Federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible if not probable during an earlier era."

As was said by this Court in *Sullivan v. Little Hunting Park*, supra, in holding that the plaintiff was entitled to compensatory damages under Section 1982 ". . .the existence of a statutory right implies the existence of all necessary and appropriate remedies."

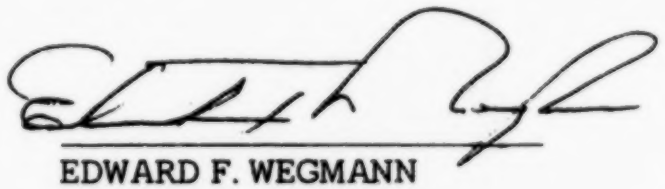
The lower courts have correctly held that there is no impediment to the creation of a Federal common law of survival in Civil Rights Actions in favor of the personal representative of the deceased. The holding was mandated by the policies underlying the Civil Rights laws and this Court's treatment of survival of actions in analagous contexts.

The Trial Court's decision and the affirmation thereof by the Appellate Court allows Clay Shaw to have his day in court and seek to vindicate his character, his name and reputation which the prosecuting attorney, Garrison, and his co-conspirators, including petitioner herein, sought to destroy as a result of their actions against him by prosecuting him for a crime committed in another jurisdiction outside of the scope of authority of the prosecuting attorney for Orleans Parish, Louisiana, and a crime with which Shaw was in no way connected or implicated. The mere fact that the law of Louisiana may differ with that of the Federal com-

common law should not be allowed to abrogate the achievement of justice.

CONCLUSION

For the reasons set forth above, it is submitted that the petition for certiorari should be denied.



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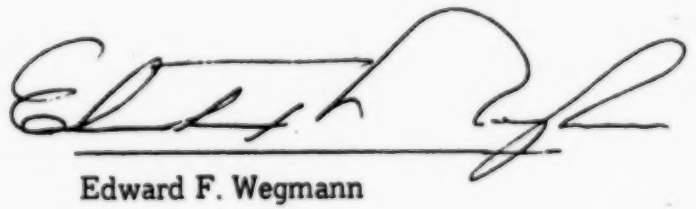
CERTIFICATE OF SERVICE

New Orleans, Louisiana
November 11, 1977

I hereby certify that I have this day served three (3) copies of the foregoing response to the application of Willard E. Robertson to the Supreme Court of the United States for certiorari to the Court of Appeals for the Fifth Circuit, by placing same in the United States Mail, postage prepaid, addressed to Malcolm W. Monroe, 47th Floor, One Shell Square, New Orleans, Louisiana 70139; Lawrence D. Wiedemann, 841 Carondelet Street, New Orleans, Louisiana; Joseph M. Rault, Jr., 234 Loyola Avenue, New Orleans Louisiana 70112; Richard C. Baldwin, One Shell Square, New Orleans, Louisiana 70139; Peter J. Butler, American Bank Building, New Orleans, Louisiana 70130 and Jim Garrison, 710 Carondelet Street, New Orleans, Louisiana 70130, and/or all interested individuals at their post office address.



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